No. 2029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC LIVE STOCK COMPANY (a corporation),

Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a corporation) and HARNEY VALLEY IMPROVEMENT COMPANY (a corporation),

Appellees.

REPLY BRIEF FOR APPELLANT.

WIRT MINOR,
EDWARD F. TREADWELL,
Solicitors for Appellant.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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REPLY BRIEF FOR APPELLANT.

The brief for appellees not having been filed prior to the argument, the court granted appellant leave to file a reply thereto, and pursuant to such leave we now briefly reply to the points suggested by that brief. The appellees have also suggested a diminution of the record and ask that the entire evidence taken in the case be certified to this court. We will likewise reply to that matter in this brief.

I.

THE CONTENTION THAT THE MATTER INVOLVED IN THE APPEAL WAS WITHIN THE DISCRETION OF THE COURT AND NOT APPEALABLE IS UNFOUNDED.

It is not disputed by counsel, but on the contrary expressly admitted, that appellant is entitled to appeal from a particular portion of the decree which is adverse to it, but it is argued that the subject matter in question is not subject to an appeal because entirely within the absolute discretion of the trial court. It cannot be disputed that the appellant is the owner of certain important rights in the Silvies river and that as a riparian owner of land bordering upon it and as an actual user of the water of the river it is entitled to invoke the aid and authority of a court of equity in the protection of those rights. Prima facie, it is entitled to the full benefit of the natural flow of the water of the river past and over its lands. In support of that right it filed its bill in this case, and it was incumbent upon the defendants to set forth what right they had or asserted in the waters of the stream, and it was therefore necessarily incumbent upon the court to determine whether or not those rights existed and whether or not they were superior to the rights of the complainant, and if not it was its duty to enjoin the exercise of the rights claimed by the defendants. The defendants did appear and did set up their asserted rights, namely: their asserted right to divert any surplus water over and above the amount actually used by complainant and other persons using the water of the stream. It was therefore the bounden

duty of the court to determine whether or not there was any such surplus water, and, if so, whether or not the defendants were entitled to divert it as against the rights of complainant, and that duty was not one resting in discretion of any kind or character. This seems so clear that argument would appear to be unnecessary, and we think it will hardly surprise the court to find that the authorities cited by appellees in no way support the contrary contention.

The following cases cited by appellees to wit:

McMicken v. Perin, 18 How. (59 U. S.) 507;
Wyle v. Coxe, 14 How. 1;
Steines v. Franklin County, 14 Wall. 15;
McLeod v. City of Albany, 66 Fed. 378;

went simply to the point that an application to the trial court for a rehearing is addressed to the discretion of the court.

In the case of *Terry v. Commercial Bank,* 92 U. S. 454, relied upon by appellees, it was simply held that a motion made after final decree was addressed to the discretion of the court.

In the case of *Barr v. Gratz,* 4 Wheat. 213, it was simply held that refusal to grant a new trial was not ground for a writ of error. So the cases cited in 2 Daniell's Chancery Practice, 1462-3, cited by counsel, all refer to orders granting or refusing a rehearing, granting or refusing temporary injunctions, granting or refusing petitions for intervention, and granting or refusing orders appointing receivers, etc. It is therefore perfectly

clear that such cases are no authority whatever in favor of the position of appellees.

Counsel also cite certain cases to the point that the court may in its discretion reserve certain matters for further consideration. All those cases, however, on examination will be found to be cases where matters as to accounting, administration of funds and matters of that kind, are reserved for further consideration. No case can be found where it is held that the court can reserve the only issue in the case. In fact, as is stated by Daniell in the section cited, "The general rule of the court " is to make a complete decree upon all points con- " nected with the case". But in this case the court did more than reserve something for further determination, for it reserved the right to the defendants to go into some other court or "appropriate tribunal" and there have determined the very matter in litigation in this case, and thereupon to come in and have vacated the final judgment to which the court had already decreed we were entitled in this case.

II.

THE CLAIM THAT UPON AN APPEAL BY ONE PARTY FROM A PART OF THE DECREE THE OTHER PARTY MAY REOPEN THE ENTIRE CASE AND HAVE REVIEWED THE PORTION OF THE DECREE WHICH IS AGAINST HIM IS UNFOUNDED UNDER THE PRACTICE IN THE FEDERAL COURTS.

It is true that the cases cited by counsel under the old chancery practice held that an appeal by one party from

a part of the decree in equity reopens the entire case and permits the appellee to have reviewed the portion of the decree which is adverse to him, but that rule does not prevail in the federal courts. Under our system any person dissatisfied with a decree of the Circuit Court must file his assignments of error, and if he relies upon the insufficiency of the evidence to sustain a particular finding, his specifications must point out the particular finding which he claims is unsupported by the evidence. In this case the court found in favor of the complainant and against the defendants on the only issue of fact in this case and granted an injunction in favor of complainant and against the defendants accordingly. If the defendants desire to review that finding they must file specifications of error directed to the finding in question and pray for a reversal of the decree and obtain permission to appeal therefrom. None of these things have been done by the defendants, but on the contrary they have apparently entirely acquiesced in the finding and decree. Under these circumstances it is well settled under the practice in this court that upon our appeal the appellees cannot assail the findings or decree so far as they are in our favor.

An appellee who does not take an appeal, and a defendant in error who does not sue out a writ of error, can not confer jurisdiction upon an appellate court to consider or review rulings adverse to him upon questions suggested by an assignment or argument of cross errors,—he may be heard only in support of the order, decree or judgment below.

Board of Commissioners v. Hurley, 169 Fed. 92.

Where each party appeals each may assign error; but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard except in support of the decree from which the appeal of the other party is taken.

The Maria Martin, 12 Wall. 31, 20 L. ed. 251.

A party not appealing from the decision of the district court can in this court only be heard in support of the decree of the court below.

Bush v. The Alonzo, Fed. Cases 2223.

Assignments of error by the appellee in a case in equity cannot be considered unless an appeal is taken by him.

Building & Loan Association v. Logan, 66 Fed. 827.

The court cannot notice errors assigned in the brief of counsel for appellees in an equity case.

Clark v. Killian, 103 U. S. 766; 26 L. ed. 607;

Guarantee Company v. Insurance Company, 124 Fed. 172;

U. S. v. Blackfeather, 155 U. S. 180, 39 L. ed. 114;

The Stephen Morgan, 94 U. S. 599; 24 L. ed. 266;

Cleary v. Ellis F. Co., 132 U. S. 612, 33 L. ed. 473;

Bolles v. Outing Co., 175 U. S. 262, 44 L. ed. 156.

Appellees cannot be heard to assail the judgment below since they did not appeal.

Southern Pine Company v. Ward, 208 U. S. 126; 52 L. ed. p. 420;

Field v. Barber Asphalt Co., 194 U. S. 618; 48 L. ed. 1142.

No one but the appellant can be heard in the appellate court for the reversal of the decree.

New Orleans etc. Co. v. Fernandez, 20 L. ed. 249.

III.

THE MOTION AGAINST A DIMINUTION OF THE RECORD IS NOT WELL FOUNDED.

In this case the appeal being from one separate part of the decree, the trial court made an order designating what should constitute the record on appeal as follows: "said record to consist of the pleadings and final de- "cree in said cause and said petition for appeal, as- "signment of errors, undertaking on appeal, order al- "lowing the appeal, citation on appeal" (Trans. p. 43). Appellees have never moved to have this order in any way modified, and after the record was transmitted to this court, printed and delivered to appellees, they took no proceedings to obtain the balance of the record until the argument in this court. It is not claimed that the balance of the record is necessary in order for the court to pass upon the portion of the decree appealed from, but it is sought to have the balance of the record sent

up in order that the appellees may assail the portion of the decree which is against them and as to which they have not appealed. As we have shown, it is not available to them to review the balance of the decree, and therefore the motion is clearly unfounded.

But even if that were their privilege they should not be permitted at this stage of the case to insist upon having the entire record transmitted to this court. Under the provisions of Sec. 698 of the United States Revised Statutes, it is provided that the transcript of the record shall only contain such parts of the proofs "as may be necessary on the hearing of the appeal". Paragraph 3 of Rule 8 of the Supreme Court provides that only such proceedings need be included as are "necessary to the hearing in this court". The practice in the Supreme Court applies in the Circuit Court of Appeals (Rule 8 of the Circuit Court of Appeals of the 9th Circuit), and by paragraph 3 of Rule 14 of the Circuit Court of Appeals of the 9th Circuit it is provided that the record need only contain such proceedings as are "necessary to the hearing in this court".

The words "as may be necessary on the hearing of the appeal" apply to the proofs or evidence and only such proofs and evidence as may be necessary to the hearing of the appeal need be included in the record.

Nashua etc. Corporation v. Boston Corporation, 61 Fed. 237 (Circuit Court of Appeals, First Circuit);

Missouri etc. Ry. v. Dinsmore, 108 U. S. 31; 27 L. ed. 640; 2 Supreme Court 9.

The attorney for the appealing party in the first instance is the judge of what papers are necessary. If the clerk is in doubt he may obtain instructions from the trial court. If the party appealed against is dissatisfied he has his remedy by mandamus, suggestion of diminution of record and certiorari.

Nashville etc. Corporation v. Boston etc. Corporation, 61 Fed. 237, 245;
Gregory v. Pike, 64 Fed. 417;
Hoe v. Kahler, 27 Fed. 145,

or the appellate court may direct the proper papers to be filed on pain of the appeal being dismissed.

Florida etc. R. R. Co. v. Schulte, 10 Otto 644;
Gregory v. Pike, 64 Fed. 417;
Rodgers v. United States, 152 Fed. 426;
Flickinger v. First National Bank, 145 Fed. 162;
Kansas v. Meriwether, 171 Fed. 39.

The Supreme Court has condemned the practice of bringing up unnecessary papers.

Railway Co. v. Stewart, 95 U. S. 279, 284;
Craig v. Smith, 100 U. S. 226, 230;
The Adriatic, 103 U. S. 730;
Ball etc. Co. v. Kraetzer, 150 U. S. 111, 118.

And has approved a modified certificate of the clerk certifying to such papers as are necessary.

Hodges v. Vaughn, 19 Wall. 12;
United States v. Gomez, 1 Wall. 690;
The Rio Grande, 19 Wall. 178.

It therefore clearly appears that the appellees have acquiesced in the decree so far as it is against them,

have filed no specification of errors in respect thereto, have not appealed therefrom, have permitted the trial court to make an order prescribing what should constitute the record on this appeal, have permitted the appellant to file its brief on that record and have not taken any steps to transmit to this court the portion of the record which they now desire the court to review to assail the part of the decree which is against them. Certainly the appellant was entitled to assume under these circumstances that they were satisfied that they could not reverse the decree, and if they desire to do so upon our appeal it was certainly their duty to see that that part of the record was transmitted to this court before the case was briefed and argued, otherwise the appellate court would have an entirely new and different question presented to it without any oportunity to the parties to argue the same.

IV.

THE RECORD IN THE CASE OF PACIFIC LIVE STOCK COMPANY vs. W. D. HANLEY ET AL.

In order to review the finding of the trial court that there was no surplus water not beneficially used, appellees have imported into the case a stipulation entered into between the parties in the trial court to the effect that the testimony in the Hanley case might be used by either party in this case, and then proceed to refer to the record in the latter case and attempt to show from that record that as a matter of fact there is a surplus

of water, although they also show that in this case there was taken 601 pages of testimony which is not before this court and although they admit that the matter of such surplus water was in no way involved in the Hanley case. It would therefore be a waste of time for us to follow counsel in their strained effort to prove such surplus water from the testimony in the Hanley case, but we will simply state that the evidence actually introduced in this case showed conclusively that there was no surplus water, notwithstanding the testimony of Hanley, which is relied upon by the appellees.

We believe that the foregoing answers all of the matters contained in the brief for appellees which are material to this appeal.

Respectfully submitted,

Wirt Minor,
Edward F. Treadwell,
Solicitors for Appellant.